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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-702

BRUCE CHARLES BURGER, *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

ROSENBERG, WARSHAW & PERL, P.A.
HARVEY ROSENBERG
RAPHAEL PERL
1001 Spring Street
Silver Spring, Maryland 20910
Attorneys for Petitioner

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Maryland entered July 3, 1973.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland, No. 555, Sept. Term 1972 is reprinted in Appendix A hereto. Said opinion is unreported.

JURISDICTION

The Court of Special Appeals of Maryland entered its Judgement on April 16, 1973. A timely petition for certiorari was filed with the Court of Appeals of Maryland. The Court of Appeals of Maryland denied certiorari on July 3, 1973, a copy of said Order is reprinted in Appendix A hereto. A request for an extension of time within which to petition for Certiorari was filed and an extension was granted until October 31st, 1973.

The jurisdiction of this Court is invoked under 28 USCA 1257(3).

THE QUESTIONS PRESENTED

1. Does the right to a speedy trial include the right to a speedy mental examination in a case where insanity is the only defense and did the Government's failure to comply with two court orders ordering a speedy mental examination in this case severely prejudice the Petitioner, violate the Petitioner's right to a speedy trial and *de facto* deprive him of his only defense without due process of law?

2. Did the Trial Judge improperly interfere with and change the Jury's verdict thereby depriving the Petitioner of his right to a jury trial and thereby depriving the Petitioner of his liberty without due process of law?

3. Was the Petitioner deprived of his right to a trial by an impartial jury by the Trial Judge's failure to allow Petitioner's counsel to ask certain key *voire dire* questions to the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are

Amendment 5 to the United States Constitution
Amendment 6 to the United States Constitution

Amendment 14 Section 1 of the United States Constitution

The provisions of said Constitution are printed in Appendix B hereto.

STATEMENT

The Petitioner in this case, Bruce Charles Burger, was arrested on Feb. 16, 1971 and charged with 6 counts of sale and possession of LSD and Hashish (R.1).

On March 22, 1972, Bruce Charles Burger, now a full-time student at Montgomery Junior College, went to trial. He pleaded "Not Guilty by Reason of Insanity." (R. 11).

At the trial defense counsel requested that certain written questions be asked the jury on *voir dire* examination (Tr. 13). Petitioner's counsel's request to ask certain key questions on *voir dire* to the jury was denied (Tr. 14). Petitioner noted his objection, which was overruled (Tr. 13-14).

The proposed questions which were denied are stipulated to have been the following:

(A) "Is there anyone among you who doubts there are circumstances under which smoking marijuana could cause an illness and/or a mental defect?"

(B) "Is there anyone among you who feels that a person should be punished if he physically and/or psychologically has to use drugs, regardless of the circumstances?"

(C) "Is there anyone among you who could not give the defendant a fair trial because he feels the use of drugs is contrary to the teachings of his religion?"

(D) "Is there anyone among you who could not give the defendant a fair trial because he [she] feels the sale of drugs is contrary to the teachings of his [her] religion?"

(E) "Is there anyone among you who could not give the defendant a fair trial because he [she] feels the giving away of drugs is contrary to the teachings of his [her] religion?"

(F) "Is there anyone among you who knows someone who has used drugs and has suffered from it?"

(G) "Is there anyone among you who doubts that the use of drugs can change a person's perception of reality?"

(H) "Is there anyone among you who doubts that the use of drugs can and does impair a person's ability to know the difference between right and wrong?"

(I) "Is there anyone among you who doubts that the use of drugs could impair a person's ability to know the difference between right and wrong?"

(J) "Is there anyone among you who believes that police officers never sell drugs?"

(K) "Is there anyone among you who believes that police officers never entrap people?"

The Trial Judge ordered, on 2 occasions, that the government conduct a mental examination of the Petitioner within 60 days (June 17, 1971 and 27 July 1971) (R. 12, 15). It was not until the 7th of December 1971 (Tr. 111 [12-15]) that the government conducted this examination. Clearly, by the government's expert's own admission, this time delay hurt their ability to make an accurate diagnosis of Petitioner's condition at

the time of the incidents in question, particularly as Petitioner had been undergoing treatment.

Petitioner's counsel attempted to show Petitioner had been under the prolonged and intensive care of a psychiatrist since the appellant had been charged (Tr. 187). Petitioner's counsel further attempted to show that petitioner was rehabilitated and sane when the government psychiatrists interviewed him in a 2 1/2 hour interview some 12 months after the alleged offense (Tr. 196 [1-2]). Petitioner's counsel further attempted to show that because petitioner had been rehabilitated, it would be practically impossible to determine with a reasonable degree of medical certainty that Petitioner had been sane at the time of the alleged incident.

Petitioner's psychiatrist, Dr. Murphy, testified that he had first seen petitioner in March 1971 (3 months after the incidents in question), and that Petitioner had been seen by him about 25 times (Tr. 187), that Petitioner was insane at the time of the alleged offense (Tr. 196 [1-2]), but that he had subsequently improved and was now a full-time student with good grades (Tr. 194 [4]).

The government expert, Dr. Sauer, saw petitioner for 2 hours on December 7, 1971, 10 months after the alleged incidents (Tr. 111 [12-15], Tr. 112 [16-18]).

The record of the government's case speaks for itself.

Examination of Dr. Sauer:

". . . We did make a diagnosis of drug dependence in Mr. Burger's case, and we feel that he was an habitual, heavy user of marijuana." (Tr. 119 [20-21]).

* * *

"Q. Do you think it likely that in the period between the time of these offenses and the time of your seeing Mr. Burger that he would have been unable to conform his conduct to the law, but then undergo such a cure within those months that he would be able to give you the impression that he had always been able to conform his conduct?

"A. Well, of course, this is a possibility. However, nothing that he told me or that would make me think that he was in such a state at any time in the past.

"Q. Your witness."

CROSS EXAMINATION

By Mr. Rosenberg:

"Q. I noticed you said that he had drug dependency. Is that a mental disease or defect?

"A. Well, it is a mental disorder, and the American Psychiatric Handbook, I think, under the Maryland definition of a disease, it would have qualified as one.

"Q. And that would be under the APA Diagnostic and Statistical Manual of Mental Disorders, and that is 304.5, Drug Dependence, Cannabis sativa (hashish, marijuana)?

"A. Yes." (Tr. 122-123)

* * *

Examination of Dr. Mackay:

"Q. So that if a person is smoking more and more marijuana his hallucinogenic state, which he really puts himself into, as I understand the studies on marijuana, through his own psycho mechanism, is that right, Doctor?

"A. If he voluntarily smokes it himself his psycho mechanisms, not the cortical center, are so altered that he has a reactive confusional state to the entire concept of drugs.

"His own mind, his thinking processes, well, of course, they are confused, the more he takes.

"Q. If he can't think, Doctor, how can he conform?

"A. If he can't think he can't conform, of course (Tr. 158).

* * *

"Q. He could have been severely disordered?

"A. I am sure he was. I would be severely disordered if I had a lot of what he is alleged to have had.

"Q. You are talking about drugs?

"A. I am.

"Q. You would have been?

"A. Oh, yes, and so would you." (Tr. 174)

* * *

"Q. So that he was so confused and so disordered he might not have been able to understand or conform to the law?

"A. He wouldn't understand anything, perhaps." (Tr. 176)

* * *

The jury found Petitioner guilty on counts 1 and 4, and the forelady, in giving the verdict, said:

"I have one more thing to say. We were permitted to request leniency and continued rehabilitation. We only make these guilty verdicts with the request for leniency and continued rehabilitation". (Jury Verdict Tr. 3-4).

Defense counsel argued that, in effect, the jury did not understand the Judge's instructions and had reached a compromise verdict where the jury, after approximately one hour and 50 minutes, came to a compromise and decided to find the Petitioner sane, only if he kept under the constant care of his psychiatrist, and is permitted to continue going to school.

The Judge had trouble hearing the verdict (July Verdict Tr. 4 [20]) and the State's Attorney, when asked by the Judge what the verdict was, did not inform the Judge of the conditional wording of the verdict (Jury Verdict Tr. 5 [19-25]).

A verdict of "Guilty" on both counts (sale of LSD and possession of hashish) was entered at the suggestion of the State's Attorney, the conditional verdict being tossed aside as constituting the mere surplusage of a mercy recommendation (Jury Verdict Tr. 5-6). Petitioner was released on a $5,000 surety bond pending the determination of this appeal (Jury Verdict Tr. 7).

Petitioner was sentenced to serve 2 1/2 years. Petitioner filed a timely appeal to the Court of Special Appeals of Maryland (R 59, 63).

Petitioner's brief to the Court of Special Appeals of Maryland raised and addressed itself to the 3 questions before this Court (p. 20-31).

The Court of Special Appeals of Maryland affirmed the decision of the lower court by its order of April 16, 1973 (R 77).

The Court's opinion (See Appendix A) addressed itself to the question dealing with the refusal to allow voire dire questions and to the question of improper change of the jury verdict. The Court however chose to avoid the claimed constitutional issue arising out of the State's failure to provide mental examinations as ordered by the Trial Judge.

Petitioner filed a timely petition for certiorari to the Court of Appeals of Maryland and on July 3, 1973 the Court of Appeals of Maryland denied the petition (R 78).

REASONS FOR GRANTING THE WRIT

A) Petitioner believes that he is raising a Constitutional question the substance of which has not been heretofore determined by this Court. This question is the first question listed by the Petitioner, namely:

> Does the right to a speedy trial include the right to a speedy mental examination in a case where insanity is the only defense and did the government's failure to comply with two court orders ordering a speedy mental examination in this case severely prejudice the Petitioner, violate the Petitioner's right to a speedy trial and *de facto* deprive him of his only defense without due process of law?

In this case, the government, in violation of *2* Court Orders ordering mental examination of the Petitioner with 60 days, delayed such examination until 10 months after the Petitioner was arrested.

When the government's experts finally examined the Petitioner they admittedly could only speculate as to his mental state some 10 months before, as at the time of their examination, he was no longer using drugs and/or suffering from their aftereffects. In addition, he had by then completed 10 months of very extensive psychistric care, and his condition was a fairly normal one.

Thus, it would be argued that the government by its failure to promptly examine the Petitioner as ordered 2 times by the lower court, effectively deprived the Petitioner of his only defense: his mental state at the time of the offense.

Inherent in the concept of a right to a speedy trial is the right to freshly preserve evidence: witnesses die, memories change, and appearances of evidence and individuals may change. A right to a speedy trial has been said to be a relative one to be judged by all the surrounding circumstances. *Beavers* v. *Haubert* (1905) 198 US 77, 49 L Ed 950, 25 S Ct 573; *United States ex rel. Hanson* v. *Ragen* (7th Cir. 1948) 166 F.2d 608.

It is argued that in an insanity defense case such as this one where the accused was under the heavy influence of drugs and hallucinogens at the time of the offense, it is essential that he be given a prompt mental examination. Not to do so borders on the suppression of the only evidence he has (his current seriously confused state of mind) and as such it can be argued that it unconstitutionally violates due process of law if the State delays such an examination. *United States ex rel. Almeida* v. *Baldi* (3rd Cir. 1952) 195 F.2d 815, 33 ALR2d 1407, cert den 345 US 904, 97 L Ed 1341, 73 S Ct 639, reh den 345 US 946, 97 L Ed 1371, 73 S Ct 828; *Curran* v. *Delaware* (3rd Cir. 1958) 259 F.2d 707, cert den 358 US 948, 3 L Ed 2d 353, 79 S Ct 355.

Furthermore such conduct on the part of the State invokes a gut reaction of being unconstitutionally violative of due process in that it blatantly disregards respect of values implicit in the concept of ordered liberty. *Palko* v. *Connecticut* (1937) 302 US 319, 325, 82 L Ed 288, 292, 58 S Ct 149.

It is worthy also to note that four Justices have acknowledged that the Due Process Clause of the Fifth Amendment would require dismissal of an indictment if it were shown that pre-indictment delay caused substantial prejudice to the defendant's right to a fair

trial and assuming the delay was purposeful. *United States* v. *Marion* (1971) 404 US 307, 30 L Ed 2d 468, 92 S Ct 455.

Such conduct is violative of the assured's right to a fair trial and the right to a fair trial is clearly protected by the Due Process clause of the Fourteenth Amendment.

B) On the *voire dire* issue, Petitioner's attorney attempted to ask questions which would disqualify for cause. Petitioner is not asking for a degree of impartiality which would be impossible to obtain. (*Irvin* v. *Dowd* (1961) 366 US 717, 6 L Ed 751, 756, 81 S Ct 1939). He is asking for a very reasonable standard and the due process of law in the Fifth and Fourteenth amendments requires a hearing to be before a fair and impartial tribunal and violate his right under the Sixth amendment.

C) Finally on the issue of improper change or interference with the jury's verdict, if the Court agrees with Petitioner's contention that the verdict was in fact interfered with and as such illegally changed, the result should be clear. Such conduct would be violative of due process and could be said to offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Leland* v. *Oregon* (1952) 343 US 790, 96 L Ed 1302, 1309, 72 S Ct 1002, reh den 344 US 848, 97 L Ed 659, 73 S Ct 4; *Rochin* v. *California* (1952) 342 US 165, 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396.

Furthermore it would be violative of Petitioner's right to a jury trial as guaranteed by the Sixth Amendment.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

ROSENBERG, WARSHAW & PERL, P.A.
HARVEY ROSENBERG
RAPHAEL PERL
1001 Spring Street
Silver Spring, Maryland 20910

Attorneys for Petitioner